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July 19, 2019

BY ELECTRONIC FILING
Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: *Promoting Telehealth in Rural America*, WC Docket No. 17-310, Draft Report & Order (FCC-CIRC1908-03)

Dear Ms. Dortch:

Alaska Communications respectfully requests that the Commission consider these comments before voting on the above-captioned draft Report and Order. While it is critical that the Commission reform its rules for the rural health care ("RHC") program, and the telecom program in particular, it is equally important to the future of the RHC program that the rules adopted by the Commission advance, rather than hinder, the statutory goal of ensuring that healthcare providers have affordable access to the services they need to provide medical care in rural parts of the Nation.[1] In several respects the draft Report and Order may fail to advance that goal.

1. Extremely Rural Areas In Alaska Are Not Alike In Costs or Service Availability

The draft Report and Order would adopt rate ceilings for the rural rate eligible for support under the telecom program.[2] The draft Report and Order instructs USAC to calculate a median rural rate based on "available rates for the same or similar services offered within the healthcare provider's rural tier" in the same state.[3]

Alaska Communications does not object to this proposal in principle – indeed, the company itself proposed that rate ceilings be adopted for similar services in similar locations.[4] However, as articulated in Alaska Communications' proposal, the rate ceiling must reflect the type of service offered (Layer 2 service where the routing is managed by the customer, versus

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1 47 U.S.C. §254(h)(1)(A).
2 Draft Report and Order ¶61.
3 Draft Report and Order ¶57.
4 *Promoting Telehealth in Rural America*, WC Docket No. 17-310, Supplemental Comments of Alaska Communications (filed Jan. 30, 2019) at 11-13.

Layer 3 services where routing is managed by the service provider) and the location served (on-road, off-road or satellite-only) so that only services with similar cost-causative characteristics, including similar performance characteristics, would be compared on price.

Unfortunately, however, under the system described in the draft Report and Order, all but a small number of locations served by Alaska's rural healthcare providers would be grouped in the "Extremely Rural" tier *with a single median rate for all*, regardless of whether the location is on-road, off-road or served only by satellite. This would effectively cut off all of the highest-cost Alaska locations from service supported by the RHC program, and severely impair the public interest by de-funding telehealth services for the neediest rural Alaskans.

In Alaska, which has the largest land mass and lowest population density of any state, extraordinarily rugged terrain and challenging weather conditions, the rates for high-speed broadband transmission services differ significantly in diverse geographic locations. In a small, extremely rural community that is not located on the road system, the price for a service can be ten times (or more) greater than the price for the same service in a similarly-sized (yet still extremely rural) community on the road system. These price differences often reflect very high underlying costs associated with purchasing capacity from third-party service providers to span the considerable distance to an existing fiber network. This third-party "middle mile" capacity may be provided over fiber but more often is provided over a terrestrial microwave or satellite network. Some off-road, extremely rural communities are served by more than one network. Other communities have access to just one source of middle-mile transmission capacity. The result is that prices vary widely between on-road and off-road communities, and between locations that only are served by satellite and locations that also are served by terrestrial networks.

The draft Report and Order fails to account for these fundamental cost-causative differences in Alaska locations, within the extremely rural tier. To illustrate with a hypothetical example, based on Alaska Communications' experience, in five extremely rural communities with comparable populations in five different parts of the state, users each may purchase 10 Mbps Ethernet services at the monthly price of $2,000, $5,000, $10,000, $20,000 and $50,000, respectively. In this hypothetical, the draft Report and Order would assign a median rural rate (rural rate ceiling) of $10,000 per month for 10 Mbps Ethernet in these communities, which would render economically infeasible continued service to the communities where the cost of the service provider exceeds the median rate by a large margin.

A simple solution would be to sub-divide Alaska's "extremely rural" tier into 3 sub-tiers: locations that are on the road system with access to terrestrial broadband, locations that are off the road system with access to terrestrial broadband, and locations that are exclusively served by satellite, as previously suggested by Alaska Communications.[5] The rates for similar services offered over the available networks throughout extremely rural Alaska, taken together, would provide a sufficiently diverse set to create a meaningful but separate median for on-road

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[5] *Promoting Telehealth in Rural America*, WC Docket No. 17-310, Supplemental Comments of Alaska Communications (filed Jan. 30, 2019) at 11-13.

communities, for off-road communities, and for satellite-only communities.

Another solution would be to distinguish between available rates that include a third-party cost component (which would have to be appropriately documented), and those that do not. If rural rates for services that include a third-party cost component are classified as not "similar" to rural rates that do not include a third-party cost component, the rates grouped together for purposes of developing a median would be more likely to be similar in cost characteristics. Alternatively, the Commission could treat documented third-party costs as exogenous, effectively not considered in developing or enforcing the median rural rate for that service and area. For example, in the five communities above, the $50,000 monthly rate might reflect $10,000 of costs of the service provider itself and $40,000 in out-of-pocket costs paid to a third-party long-haul (or middle mile) service provider. In that example, the $50,000 monthly rate would qualify for support in a class of services with a $10,000 median rate, because the $40,000 would be considered an exogenous expense and not subject to the median-derived rural rate ceiling for those services.

The most rural parts of the nation also tend to be the poorest in terms of healthcare.[6] Alaska Communications urges the Commission to adopt one of these proposed solutions, so that advanced broadband service to the highest-cost, least-served healthcare locations in Alaska continues to be made available with support from the RHC telecom program.

2. Rural Healthcare Providers May Obtain Support For the Advanced Services They Need To Deliver Rural Telehealth Services, Including Advanced Telecommunications and Information Services Offered On a Non-Common Carrier Basis

The draft Report and Order briefly considers whether services that are not telecommunications services (*i.e.,* telehealth transmission services offered on a non-common carrier basis) may be supported under the RHC telecom program. It concludes that they may not, citing Section 254(h)(1)(A) of the Communications Act as interpreted by the 1997 *Universal Service First Report and Order*.[7] This analysis is inadequate in several respects, ignoring other aspects of Section 254, and potentially disqualifying for RHC support one of the principal telehealth transmission services purchased by Alaska's rural healthcare providers.

Stating that the telecom program "only supports telecommunications services" and not private carriage or advanced information services ignores the mandate of Section 254 of the

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6 *E.g.,* draft Report and Order, ¶1. *See also Promoting Telehealth in Rural America*, WC Docket No. 17-310, Comments of Alaska Native Health Board (filed Feb. 2, 2018) at 5 ("because of limited infrastructure, extreme geographic isolation, limited historic investment in utilities and communications systems, and very high travel, fuel, and health care costs, Alaska stands out as a unique example of the rural-urban divide the RHC was intended to address"). *See generally Promoting Telehealth in Rural America*, WC Docket No. 17-310, Reply Comments of Alaska Communications (filed March 5, 2018) at 9-11.

7 Draft Report and Order ¶90 & n.245.

Communications Act to consider the evolving demands of healthcare providers as part of the universal service obligation. Under Section 254(b)(6) of the Act, rural healthcare providers should have access to "advanced telecommunications services" as described in subsection (h) of Section 254, *but the Commission need not limit eligible services to those designated under subsection (h)*. Under Section 254(c)(1) of the Act, "[u]niversal service is an *evolving* level of telecommunications services that the Commission *shall* establish periodically under this section, *taking into account advances in telecommunications and information technologies and services*."[8] Importantly, Congress expressly provided that the Commission "*may designate additional services*" as eligible for the support mechanisms for healthcare providers for the purposes of subsection (h).[9]

Further, Section 254(b) requires that FCC policies be based on specific principles including that access to "advanced telecommunications *and information services*" should be available in all regions of the Nation[10] and that consumers in all regions of the Nation should have access to, *inter alia*, advanced telecommunications *and information services* "that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas."[11] There is no evidence that Congress intended to exclude healthcare providers from access to advanced telecommunications *and information services* that are used for broadband transmission of information as part of telehealth services in rural areas.[12]

The draft Report and Order's cursory treatment of eligible services fails to reflect this legislative emphasis on advancements in technology and the evolving nature of broadband transmission services, which today can be private telecommunications or advanced information services, in addition to common carrier telecommunications services. Under the statutory

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8 47 U.S.C. §254(c)(1) (emphasis added).

9 47 U.S.C. §254(c)(3) (emphasis added).

10 47 U.S.C. §254(b)(2) (emphasis added).

11 47 U.S.C. §254(b)(4).

12 In this discussion, the use of "information service" is not intended to include broadband Internet access service ("BIAS") or other content-based offerings. Rather, Alaska Communications believes that Multi-Protocol Label Switching ("MPLS") transmission service may take the form of private carriage or, in the case of managed MPLS, an advanced information service that, for customers with multiple locations that may use different access protocols (such as ATM, Frame Relay, and Ethernet), provides for the seamless flow of traffic between those locations by performing a "net protocol conversion" between locations. Such a net protocol conversion is the hallmark of an information service. *E.g., Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905, ¶ 104 (1996); *Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 2 FCC Rcd 3072, ¶ 71 (1987). *See also Nat'l Cable & Telecomm's Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 968 (2005). Regardless of whether it is an information service under the Communications Act, however, managed MPLS service provides the necessary transmission capability on which healthcare providers rely for the provision of telehealth services in rural areas.

framework, when healthcare providers in urban areas have access to advanced services such as Multi-Protocol Label Switching ("MPLS") service offered on a private carriage basis or as managed information services, as is the case today, rural healthcare providers should have access to the same services through support from the RHC program.

As the draft Report and Order explains, the Commission's rules governing the telecom program have not been materially updated since their inception more than 20 years ago.[13] Yet the draft Report and Order overlooks how the telecommunications and information services being purchased by rural healthcare providers have significantly advanced since the program rules first were adopted. Simply stating that services provided on a non-common carrier basis (whether private telecommunications transmission services or advanced information services involving managed broadband transmission with protocol conversion) "are not telecommunications services supported by the Telecom Program" is insufficient; the draft fails to explain *why such services*, which are purchased by rural healthcare providers, *should not be supported* by the Telecom Program.

The record contains numerous references to the advanced communications services used by rural healthcare providers today, how these services have evolved over time, and how they are necessary to the delivery of modern telehealth services provided by rural healthcare providers. The record describes evolving legal requirements as well as technology changes affecting delivery of telehealth services.[14] Many rural healthcare providers rely on high-capacity packet-switched services with significant enhancements, such as protocol conversion, to deliver more advanced, more secure and more reliable healthcare services to their rural constituents.[15] These services, often provided on a non-common carrier basis, have been supported by the RHC telecom program for a number of years. The draft Report and Order fails to address any of this record evidence or explain why the public interest would not be better served by supporting such services under the telecom program.

Many rural healthcare providers request MPLS service to reliably and securely deliver advanced telehealth services in Alaska. Alaska Communications has offered MPLS service for more than ten years on a non-common carrier basis. As noted in the draft Report and Order the Commission has not yet determined whether MPLS may or should be classified as a telecommunications service.[16] Being a competitive service, it may be offered as private carriage or an advanced information service. Significantly, rural healthcare providers have selected

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13 Draft Report and Order ¶4.

14 *E.g., Tele-Health Requirements and Bandwidth Utilization: Evaluating Demands for Rural Health Care Support Over Time,* attached to *Ex Parte* Letter from Karen Brinkmann to Marlene H. Dortch, FCC Secretary in WC Docket Nos. 17-310, 02-60 (filed May 20, 2019); *Promoting Telehealth in Rural America*, WC Docket No. 17-310, Comments of Maniilaq (filed Feb. 2, 2018) at 3.

15 *Promoting Telehealth in Rural America*, WC Docket No. 17-310, Reply Comments of Alaska Communications (filed March 5, 2018) at 34. *See also* n. 12, *supra*.

16 Draft Report and Order n. 259.

MPLS as the best available high-speed broadband service to meet their needs for a managed service that is reliable, flexible and secure.

Finding that MPLS provided on a non-common carrier basis, as a managed information service, is eligible for RHC support under the telecom program will serve the public interest. It will allow healthcare providers continued access to the services on which they currently rely at an affordable rate. It will avoid the disruption and the cost that forcing these providers to renegotiate service contracts would entail, and ensure that they are not relegated to inferior service in areas where there is no common carrier alternative to MPLS. Alaska Communications respectfully urges the Commission to modify this aspect of the draft Report and Order to clarify that non-telecommunications telehealth transmission services are eligible for telecom program support regardless of whether they are offered on a common carrier basis.

3. Rural Rate Ceilings Must Be Set In a Transparent and Reviewable Process

Alaska Communications and many others asked that the Commission's rules be amended to set forth enforceable procedures governing USAC's processing of funding requests to provide greater clarity, transparency and speed of processing. Some of the procedural changes included in the draft Report and Order will be helpful toward this end.[17] In at least one respect, however, the draft Report and Order falls short: If USAC is to be the entity developing the rural and urban "medians" for purposes of limiting support based on the urban-rural difference,[18] then the Commission's rules should ensure transparency in this process.[19]

First, USAC should be required to "show its work" in developing the urban and rural medians for purposes of the RHC telecom program. It should publish the data points on which it draws, and the method of calculation, at the time it releases these medians. The data points should include not only the rates of the available services, but a description sufficiently detailed to allow third parties to confirm that the services, in fact, are the same or similar.

Second, USAC's median calculations must be reviewable. The rules should set forth a process for challenging a median, and ensure appropriate oversight by the Commission, which could be delegated to the Wireline Competition Bureau in the first instance. If the rules permit USAC to curtail or deny support based on a calculation USAC itself makes, appeal to the Commission – and timely resolution – must be provided for.

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[17] For example, Alaska Communications supports the publication of available rates (draft Report and Order ¶200), the modifications to the bidding process and filing windows (¶¶163, 166), and the elimination of *pro rata* support reductions (¶95). Alaska Communications also supports the proposed prioritization of support to areas that are the most rural and medically underserved. Draft Report and Order ¶¶104-117.

[18] Draft Report and Order ¶¶44, 58, 75.

[19] Alaska Communications has confidence that the Wireline Competition Bureau has this expertise, and the Bureau's work is subject to oversight by the Commission and transparency requirements under the FCC's rules; it is not as clear how USAC would perform these tasks, and thus transparency, oversight and avenues for review must be explicitly set forth in the rules.

4. Transitional Rules Are Necessary To Ensure Against Unreasonably Penalizing Carriers With Ongoing Service Commitments to Rural Healthcare Providers

In imposing new rural rate ceilings and urban rate floors for the telecom program to take effect at the start of Funding Year ("FY") 2021,[20] the draft Report and Order does not appear to make any provision for multi-year contracts that will have been performed in part prior to that funding year, but continue into FY'21 (and possibly beyond). For example, if a rural healthcare provider enters into an approved 3-year contract in FY'19, and the service is provided in FY'19 and FY'20 at $10,000 per month, but the new rate ceiling takes effect in FY'21 with a median rate of $8,000 per month, will the RHC-supported service provider simply be expected to lose $2,000 per month in the third year of the contract? What if the RHC service provider has incurred substantial out-of-pocket expenses to provide the service, or has a fixed-price contract with a third-party service provider, forcing the RHC service provider to incur losses for the remaining term of the contract? This type of injury to service providers would be disserve Section 254(h)(1)(A).

Alaska Communications respectfully requests that multi-year contracts approved for a funding year prior to FY'21 (or whatever year the new medians take effect) be "grandfathered" and eligible for continuing support at the approved rates (if such contracts include different rates for different years, then at the last rate which was approved) through the expiration of the contract.

In addition, in light of the sweeping changes to the rural rate rules to be adopted for the telecom program, and the Commission's decision to eliminate the cost-based mechanism for proving the reasonableness of rural rates as burdensome and time-consuming,[21] Alaska Communications requests that the Commission permit service providers to employ for Funding Year 2020 the rates that have been approved for telecom program support for FY'19. Only if a service provider offers different services or seeks a rate increase for FY'20 should it be subjected to the cost-based review process.

5. The Communications Act Does Not Permit the Commission Arbitrarily To Cap RHC Support

Finally, Alaska Communications respectfully disagrees with the legal analysis set forth in the draft Report and Order effectively concluding that, because the FCC has set a cap on RHC funding, it must be lawful for the support program to be capped.[22] That the Commission *believes* support *should be* capped begs the question whether the cap it has adopted violates the mandate of Sections 254(b)(5) and 254(h)(1)(A).

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20 Draft Report and Order ¶203.

21 Draft Report and Order ¶67.

22 *See* Draft Report and Order ¶124 ("The Commission has never treated the section 254(h)(1)(A) provision as creating an unlimited right to Universal Service Fund support for telecommunications services provided to rural health care providers").

Section 254(h)(1)(A) does, indeed, provide the Commission with "ample flexibility on how to structure a support mechanism,"[23] but it states in unequivocal terms that qualified healthcare providers serving rural areas are entitled to the services that are "necessary" for the provision of healthcare services. If the Commission does not "believe" Congress intended unlimited funding,[24] it states no basis for its conclusion in the statute or the legislative history.

Alaska Communications has never argued that funding for the telecom program should be without limit. It should be limited to what is necessary to achieve the statutory goals. It should be limited to the rural-urban rate difference. But the Commission has thus far declined to conduct an objective study of what services are necessary, and what they cost, to achieve the telehealth goals established in the Act. Until the Commission does so, any rate cap it imposes will continue to be arbitrary, unsupported by the record, and in violation of the statute.

Alaska Communications urges the Commission to increase RHC funding to a level that will be sufficient to meet the demand for FY'18, FY'19 and subsequent funding years.

Conclusion

Alaska Communications commends the Chairman and the Wireline Competition Bureau for completing a draft Report and Order in this proceeding, the outcome of which is so vital to rural Americans. With the changes recommended here, the Commission should be able to put the rural health care program, and the telecom program in particular, on more solid footing, and provided much-needed predictability to all involved in the delivery of telehealth services.

Please direct any questions concerning this matter to me.

Respectfully submitted,

Karen Brinkmann
Counsel to Alaska Communications

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23 Draft Report and Order ¶125.

24 Draft Report and Order ¶125.